In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1560

ISADORE MARION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to establish the commission of overt acts in this conspiracy prosecution and that the indictment was not sufficiently specific to apprise him of the charges and to protect him from being twice placed in jeopardy.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to collect an extension of credit by extortionate means, and using an interstate facility to promote an extortion scheme, in violation of 18 U.S.C. 891(7), 894, and 1952. He was sentenced to five-years' imprisonment on Count I; execution was suspended, and petitioner was placed on probation for five years and fined $3,000. Imposition of sentence was suspended as to Count II. The court of appeals affirmed by order (Pet. App. D).

1. Petitioner's contention that the evidence failed to prove an overt act in furtherance of the conspiracy is refuted by the following facts. On February 9, 1972, co-defendant Rizzo[1] received a telephone call from petitioner in which they discussed a $25,000 debt owed Rizzo by a young man in Los Angeles. Rizzo had attempted to collect the debt, and had slapped the debtor around, but failed to collect. Petitioner agreed to go to Los Angeles, get the name and address of the debtor and the circumstances of the debt from one Louis Gittleman, and attempt to collect the debt with the use of force, if necessary, for which he would receive $5,000 (App. 43-47).[2]

On March 16, 1972, petitioner, while in New York City, made a telephone call to co-defendant William Robertazzi[3] in Las Vegas and asked him about his progress in collecting the debt. Petitioner felt that the debtor was starting to give them "the run around" and he told Robertazzi to enlist Gittleman's aid in tracking down the debtor (App. 49). On March 17, 1972, petitioner again telephoned Robertazzi in Las Vegas, and, learning that the debtor was "ducking" Robertazzi, instructed him to call the debtor and then call Gittleman ("the old man")

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[1]Rizzo pled guilty to Count II of the indictment prior to trial.

[2]"App." refers to the Appellant's Appendix in the court of appeals.

[3]A judgment of acquittal was directed as to Robertazzi at the close of the government's case.

and tell him to talk to the debtor, "[b]ecause next time it's not going to be a friendly conversation" (App. 55-57). On April 9, 1972, petitioner returned a call from Rizzo, informed him that the debtor was "ducking out," and obtained Rizzo's authorization to "get a little heavy now" and to "crack it up" (App. 63). Rizzo asked petitioner if he had tried to get the debtor at the real estate office, to which petitioner responded negatively (App. 63-64).

Petitioner concedes that the February 9, 1972, conversation he had with Rizzo showed a conspiracy to collect an extension of credit by extortionate means, but he claims that the three ensuing telephone calls did not constitute overt acts in furtherance of the conspiracy. We disagree. The telephone conversations were for the purpose of accomplishing the extortionate collection—finding out about efforts made and giving further instructions about steps to be taken in the collection.[4] It is clear that such conversations may constitute overt acts in furtherance of a conspiracy. *United States* v. *Armone,* 363 F. 2d 385, 401 (C.A. 2), certiorari denied, 385 U.S. 957; *Singer* v. *United States,* 208 F. 2d 477, 480 (C.A. 6).[5]

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[4]Co-defendant Robertazzi's conversations with petitioner were clearly overt acts in furtherance of the conspiracy even though Robertazzi was acquitted. He was acquitted because it was not clear that he had joined the conspiracy with knowledge of its illegal purpose (App. 67), but that fact does not alter petitioner's criminal liability for using Robertazzi's services for petitioner's criminal purposes. *United States* v. *Bryan,* 483 F. 2d 88, 92 (C.A. 3) *(en banc).*

[5]*United States* v. *Marrapese,* 486 F. 2d 918, 921 (C.A. 2), is not in conflict with the instant case but is consistent with it, since in both cases an overt act in furtherance of the conspiracy was present.

2. The indictment did not name the victim of the extortion conspiracy, because his name was not known. Petitioner contends that this failure made the indictment insufficient to inform him of the nature and cause of the accusation or to protect him from being twice placed in jeopardy. However, the name of the victim was not essential here, because the crimes charged were conspiracy to extort and use of a telephone to promote the conspiracy, not the substantive crime of extortion. The crime of conspiracy to extort can be committed by an agreement and an overt act, whether or not extortionate means were ever used on the prospective victim. Since the identity of the prospective victim is not an essential element of the offenses involved here, failure to include his name in the indictment did not deprive petitioner of sufficient notice of the charges against him. See *United States* v. *Annoreno*, 460 F. 2d 1303, 1310 (C.A. 7), certiorari denied, 409 U.S. 852; compare *Llamas* v. *United States*, 226 F. Supp. 351 (E.D. N.Y.), affirmed *per curiam*, 327 F. 2d 657 (C.A. 2).[6]

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[6] *United States* v. *Tomasetta*, 429 F. 2d 978 (C.A. 1), is clearly distinguishable from the instant case. It involved the substantive offense under 18 U.S.C. 894, and the indictment accused the defendants of "making threats by an unstated means to an unnamed person on a particular day in a city of moderate size" (429 F. 2d at 979). The court found that the combination of omissions deprived the defendants of adequate notice of the crime charged and stressed that the failure to name a victim, even where a substantive scheme of extortion was charged, might not have led to such a result (*id.* at 980). *United States* v. *Rosner*, 352 F. Supp. 915, 922-923 (S.D. N.Y.), also does not conflict with the instant case as it involves the substantive offense of giving bribes to an unnamed official through an intermediary. The court in *Rosner* held that the bill of particulars naming the public official gave defendants adequate notice.

Moreover, the indictment was adequately detailed as to time, place and circumstances of the crime to protect petitioner against any further prosecution for the same crime. See *United States* v. *DeCavalcante*, 440 F. 2d 1264, 1269 (C.A. 3). The indictment furnished the period of the conspiracy, the names of the conspirators, the detailed arrangement of the conspiracy, the amount of debt, the city where the victim was to be contacted, and the precise dates, places, and participants in four separate telephone conversations claimed to have been in furtherance of the conspiracy. Moreover, petitioner was given the tapes of the four recorded conversations prior to trial, which formed virtually all of the government's evidence and which further identified the prospective victim of the extortionate conspiracy as being a young man connected with a real estate business. All the elements of the crime, as well as numerous other identifying details, were thus brought out in the indictment and trial and were fully sufficient to protect petitioner from being again charged with the crimes involved here.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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[7] *United States* v. *Agone*, 302 F. Supp. 1258 (S.D. N.Y.), is distinguishable from the case at bar because there a substantive offense involving assaults against union members was charged under a statute prohibiting violence or threats against a union member designed to intimidate the member and impede the exercise of his specific union rights. The identity, status, and activities of the member in that case were, unlike the instant case, obviously essential to the proof or defense of the crime charged.